be brought into the matter. Erdman later met with petitioner, who agreed to be of assistance in exchange for a monetary consideration.

Due to a change in the assignment of judges, arraignment of the three individuals indicted, including Moore, was moved up to early March 1961. All three entered pleas of guilty on March 9, and sentencing was set for March 30, before Judge Rayfiel. Between those dates, Erdman, Kahaner and other interested parties (but not petitioner) held meetings to discuss their approach. By March 29, 1961, Kahaner had been paid $10,000 and petitioner $5,000. On that date, Erdman, Moore, and Kahaner held an early morning meeting, at which Kahaner was paid $2,500. Erdman then went to petitioner's chambers to give him $17,500 and to remind him that Moore's sentencing was to take place the next day. Petitioner agreed to arrange a luncheon with Judge Rayfiel that day and to discuss with the judge whether consideration could be given to Moore. At their luncheon meeting, Judge Rayfiel told petitioner that he considered Moore the worst offender in the bankruptcy fraud scheme. Judge Rayfiel mentioned, too, that two other federal judges had indicated that rumors prevailed that "everything has been taken care of" in regard to Moore's sentence. Petitioner reported this conversation to Erdman, who repeated it to Moore. That evening, Moore instructed his attorney to seek withdrawal of the guilty plea.

On March 30, 1961, the attorney filed his motion to withdraw the plea. Following argument, the motion

was denied, and Moore was sentenced to imprisonment for three years, subsequently reduced to one year. During April 1961 petitioner, Kahaner, Erdman and Moore met at various times to determine whether an offer of restitution as to some of the assets fraudulently concealed from the bankrupt company might persuade Judge Rayfiel to reduce the sentence. Such an offer was ultimately made to the judge. Prior thereto petitioner had reviewed the terms of the offer, and had insisted that a certain condition as to reduction of the sentence be eliminated.

2. The present controversy centers around the $35,000 which the government established as having been paid to Kahaner and petitioner. At trial petitioner had denied receiving any portion of the money, and had suggested that Erdman kept the bribe funds furnished by Moore, and eventually used them as his share of an investment in the Ace Manufacturing Company, in which Moore, Erdman, and one Forman had purchased an interest.

At the hearing on petitioner's first *coram nobis* application, he had charged the government with suppression of an F.B.I. report, dated November 28, 1961, which had traced Erdman's bank deposits from January through August, 1961, and had accounted for all but four deposits in February. The government established at that time that the four February deposits did not involve bribe money, but had innocent sources. However, during that hearing, petitioner obtained information that in 1961 Erdman's wife had a safe deposit box which she had closed out on June 29, 1961,

and that on June 28th Mrs. Erdman had purchased $15,000 of United States Savings Bonds. In the second *coram nobis* application, petitioner contended that had he known the facts about the safe deposit box at trial, his counsel could have fashioned them into a new line of defense, to the effect that the $15,000 represented the first installment of the bribe money; that it had been given to Mrs. Erdman by her husband to place in the safe deposit box; and that as a result of being frightened by Moore's subsequent disclosures to federal agents Erdman had his wife close out the safe deposit box and use the money to purchase the bonds.

A second claim for relief below was connected to the investment in Ace Manufacturing Company. The claim was based upon an F.B.I. report, dated February 26, 1962, which petitioner alleged had deliberately not been produced at trial. The report stated that the Erdman-Moore-Forman acquisition of an interest in Ace cost $50,000; that a checking account was opened with a $100 deposit in the name of Forman in a particular New York bank on May 2, 1961; that on May 4, there was drawn on this account a check in the amount of $33,332.66 which was dated April 28 and which bore Forman's name as payor, resulting in an overdraft of $33,232.66; and that on May 5, a deposit of $33,500 cash, in bills of denominations from $10 to $100, was made in the account. The purpose of the check evidently was to cover the investment in Ace. Petitioner alleged that had he known of the

report at trial, he could have used it to substantiate his claim that he had not received the bribe money but that Erdman returned the $35,000 to Forman, who used it to invest in Ace.

3. The sole issue involved in this petition is whether the district court properly denied the second petition for a writ of error *coram nobis* without a hearing. The exhaustive opinions of the lower courts (Pet. App. A, B), upon which we rely, amply demonstrate that such extraordinary relief was not warranted in petitioner's case. At the outset, it must be noted that, contrary to the repeated statements of petitioner and present defense counsel (who were not participants at trial), this was not a close case. In the opinion of the experienced district judge, who has been involved in this case from the trial to the present collateral proceedings, the evidence against petitioner was "overwhelming" (Pet. App. 49a) and nothing was deliberately withheld by the government from petitioner. The case against petitioner did not rest solely upon Dr. Erdman's testimony; there was corroborative evidence "of a substantial and most compelling nature," including testimony by others as to petitioner's conduct and documents bearing his handwriting. 289 F. Supp. at 273. Against this background, petitioner's suggestion that the uncovering of some shred of evidence having a remote connection with the defense requires relief from his conviction was properly rejected. Petitioner's claim that the lower courts applied an improper and unduly severe standard in determining the basis

for *coram nobis* relief (Pet. 20–30)[1] is not fairly presented in a factual situation where, by any reasonable standard, no relief is warranted. *United States* v. *Morgan,* 346 U.S. at 511; see also *Byrnes* v. *United States,* 408 F. 2d 599 (C.A. 9), certiorari denied, 395 U.S. 986; *Gajewski* v. *United States,* 368 F. 2d 533 (C.A. 8), certiorari denied, 386 U.S. 913.

Petitioner also assails the failure of the district court to conduct a hearing on his *coram nobis* petition. As the courts below noted, at the argument of the motion before the district judge, both parties had taken the position that no evidentiary hearing was necessary and had urged that the issues could be decided upon the voluminous moving papers, the files and the record of the previous proceedings (Pet. App. 5a, 22a–23a). The district judge found no difficulty in resolving the questions presented without a hearing. The court held in essence, that, notwithstanding the bulk of papers filed by petitioner, he had failed to present evidence which might have given credence to the manner in which he claims he could have used the missing reports at trial; that, in any event, the testimonial and documentary evidence admitted at trial contravened the "unwarranted assumptions" he had made in asserting how he could use the reports (Pet.

[1] But see the statement by the court of appeals that the district judge properly ruled that petitioner was not entitled to relief where his claim, even if substantiated, "would not have created a reasonable doubt of petitioner's guilt in the mind of a juror who was otherwise satisfied—even if we assume the applicable test in *coram nobis* to be no higher than that * * *." 440 F. 2d at 745, Pet. App. 15a.

App. 45a); that whether or not the F.B.I. reports themselves had not been made available to him, the information contained therein "was as much available to the defense as to the prosecution" (Pet. App. 36a); and that the court was convinced "to a moral certainty" that the claimed undisclosed evidence could not have raised a reasonable doubt as to guilt in the mind of a single juror (Pet. App. 48a).

The court of appeals believed that a hearing might have been of some help to resolve the case but since neither party had requested one, and the interests of justice did not demand one, it would not direct that a hearing be held (Pet. App. 6a). Moreover, after a complete examination of the case, the Second Circuit expressed the conviction that petitioner "would gain nothing" by a hearing (Pet. App. 20a). In our view, a hearing was unnecessary because petitioner had not urged any claim which involved the resolution of a factual dispute. The constant reliance upon conjecture and surmise in alleging how, in hindsight, the undisclosed information could have been exculpatory, did not present a situation requiring a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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